(1) Supreme Court, U.S.
FILED
02 718 SEP 30 2002
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No.

In the
Supreme Court of the United States

SUSANNE B. RUSSELL KIKENBORG,
as Administratrix of the Estate of NATHAN RUSSELL,
and SUSANNE B. RUSSELL KIKENBORG,
individually

Petitioners,

v.

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, and ELMHURST HOSPITAL
CENTER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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40 pp

PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

1. This Court has held that, under the Due Process Clause of the Fourteenth Amendment, state legislatures may not immediately extinguish existing causes of action through enactment of shortened limitations periods. In this case, Kikenborg's cause of action was filed in reliance on the plain language of a New York statute extending the limitations period, but the Supreme Court of the State of New York Appellate Division, First Department ignored the plain language of the statute and applied a repealed limitations period, thereby extinguishing Kikenborg's cause of action. Should the Petition for Writ of Certiorari be granted to address whether a state's refusal to apply the remedial limitations period in effect at the time an action is filed without proper statutory notice violates a party's due process rights?

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PRELIMINARY STATEMENT

Petitioner Susanne B. Russell Kikenborg ("Kikenborg") respectfully submits this Petition asking this Court to issue a Writ of Certiorari to the New York Court of Appeals. The Petition raises an important issue under the Due Process Clause - may a state extinguish causes of action by applying a repealed statute of limitations rather than an amended statute of limitations. Specifically, when the amended statute, on its face, appears to apply to certain claims, may those very claims be extinguished without giving proper statutory notice or providing guidance to potential litigants regarding what limitations period is actually applicable. Here, the extended limitations period enacted by the New York State Legislature, on its face, clearly applied to Kikenborg's claim. No limitation as to its application to unfiled lawsuits was clearly stated within the statute. The Petition should be granted to address whether a state, without violating the Due Process Clause, may arbitrarily bar a party's claim by applying a repealed law without fair notice or a meaningful opportunity for a litigant to protect her property interest.

OPINIONS BELOW

The opinion of the New York Court of Appeals denying the Application for Leave to Appeal to the Court of Appeals is unreported. (App. A1.) The opinion of the New York Supreme Court, Appellate Division, First Department, is reported in the official New York case reporter at 291 A.D.2d 281 and in the West reporter at 738 N.Y.S.2d 37. (App. A4.) The decision of the Supreme Court of the State of New York, New York County, is unreported. (App. A7.)

JURISDICTION

The New York Court of Appeals entered a final decision denying the Application for Leave to Appeal to the Court of Appeals on July 1, 2002. (App. A1.) This Court has jurisdiction over this case under 28 U.S.C. § 1257(a) because the New York Supreme Court, Appellate Division, First Department's decision denying the Petitioner rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution involves an important question of federal law that conflicts with decisions by this Court and should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Public Authorities Law Section 2981, effective August 24, 1990[1] (McKinneys 1990):

> A wrongful death action against a public authority or public benefit corporation shall commence within two years of the happening of the death.

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[1]Pursuant to Supreme Court Rule 29(c), because this Petition may call into question the constitutionality of New York state statutes and 28 U.S.C. § 2403(b) may apply, a copy of this Petition has been served on the Attorney General of the State of New York.

New York Unconsolidated Laws, section 7401, repealed effective August 24, 1990 (McKinneys 1990):

> An action against the corporation for damages for injuries to real or personal property, or for the destruction thereof, or for personal injuries or death, alleged to have been sustained, shall not be commenced more than one year and ninety days after the cause of action thereof shall have accrued . . ..

1990 New York Session Laws, Chapter 804, § 126 (McKinneys 1990):

> This act shall take effect on the thirtieth day after it shall have become a law, and shall apply to actions accruing on or after such date.

STATEMENT OF THE CASE

This case arose out of the efforts of Kikenborg to pursue a wrongful death action in a New York state court.

A. Russell Died a Few Months Before the New York Legislature Extended the Limitations Period Applicable to Claims Against Public Hospitals, and Kikenborg Sought Letters of Administration so That She Could Pursue a Wrongful Death Claim.

On March 28, 1990, Nathan Russell ("Russell") died while under the care of Respondents New York City Health and Hospitals Corporation and Elmhurst Hospital Center (the "Hospital"), a few months before the New York State Legislature enacted a two-year limitations period for brining claims against public entities like the Hospital. Russell's heirs filed a notice of claim on June 26, 1990, and applied for letters of administration on October 29, 1990. (R. 19, 38).[2] Because of complex service issues regarding Russell's Danish heirs, an amended petition for letters of administration was submitted in August 1991. The letters naming Petitioner Susanne B. Russell Kikenborg ("Kikenborg") as administratrix were subsequently issued on February 26, 1992. (R. 38).

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[2]All references denoted as (R. __.) are to the Record on Appeal in the Supreme Court of the State of New York, Appellate Division, First Department.

B. Promptly After Receiving Letters of Administration, Kikenborg Filed a Wrongful Death Lawsuit That was Timely Under the Plain Language of the Newly-Enacted Limitations Provision.

On March 16, 1992, less than a month after receiving the letters of administration, Kikenborg filed a Summons and Verified Complaint in the Supreme Court of the State of New York, County of New York, commencing this action. (R. 22-29, 38). Kikenborg filed the Complaint within two years of Russell's death in accordance with the plain language of the statute requiring the filing of all wrongful death actions against a public authority or benefit corporation within two years of the happening of the death. N.Y. Pub. Auth. § 2981.

C. The New York Courts Refused to Apply the New Limitations Period Despite Clear Language in the Amended Statute Making it Effective Before Kikenborg Filed Suit.

On June 22, 1999, the Hospital filed a Motion for Summary Judgment arguing that a 1-year and 90-day limitations period applied, rather than the 2-year limitations period under the amendment to section 2981, effective August 24, 1990. (R. 12-37). According to the Hospital, a provision found in McKinney's 1990 Sessions Law, c. 804, § 126, restricts the amended statute to claims and causes of action arising from post-amendment deaths. (R. 12-37). To the contrary, the change of law provision applies the enlarged limitations period to all "actions accruing" after the effective date. In opposition, Kikenborg argued that the two-year limitations period applied because she commenced an action after the effective date of the 1990 amendment. (R. 38-148).

The trial court granted the Hospital's motion for summary judgment, thereby limiting the remedial effect of the 1990 amendment to only those claims arising from deaths after August 24, 1990. (App. A7-10.) Kikenborg timely filed a notice of appeal from the trial court's order, attacking the lower court's disregard for both the plain language of the 1990 amendment, and discussing at length the court's deprivation of Kikenborg's property rights without due process. (App. A4.) The Appellate Division of the Supreme Court of the State of New York, First Department affirmed, concluding that the repealed limitations period applied to Kikenborg's claim even though it was filed after the effective date of the 1990 amendment. (App. A4.) Kikenborg then filed her application for leave to appeal to the New York Court of Appeals, and the Court of Appeals denied that leave application on July 1, 2002. (App. A1.)

REASONS FOR GRANTING THE WRIT

POINT I THE WRIT SHOULD BE GRANTED TO ADDRESS WHETHER A STATE'S REFUSAL TO APPLY THE LIMITATIONS PERIOD IN EFFECT AT THE TIME A CAUSE OF ACTION IS FILED WITHOUT NOTICE VIOLATES A PARTY'S DUE PROCESS RIGHTS.

The writ should be granted to address an important issue under the Due Process Clause raised by the New York courts' decision refusing to apply a statute of limitations that, on its face, applied to Kikenborg's claim and instead applying a repealed, shorter limitations period to bar her claims. This Court has made it plain that a tort cause of action such as a claim for wrongful death constitutes a property right that has value, and once a property right has been conferred by a state legislature, it may not be taken away without complying with

the principles of due process. Under this Court's precedents, a state legislature may not, by enacting a shorter limitations period, extinguish a party's cause of action without running afoul of the Due Process Clause. The New York courts, by refusing to apply a newly-enacted extended limitations period to actions not yet filed, effectively reached the same forbidden result, depriving parties such as Kikenborg, of property rights without due process.[3]

The New York courts' reliance on an obscure provision in the session laws was also improper because that provision is impermissibly vague and application of such a provision violates litigants' due process rights, including the rights of Kikenborg. This Court's intervention is necessary because the precedent established by the New York courts will allow states to extinguish causes of action through enactments without giving proper statutory notice or providing guidance to potential litigants regarding what limitations period is actually applicable.

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[3]The Appellate Division incorrectly stated that Kikenborg's claims regarding the constitutionality of section 2981 are unpreserved for appellate review. (App. A6.) To the contrary, Kikenborg timely raised these arguments before the Appellate Division after the Supreme Court concluded that the 1990 amendment and the two-year limitations period would not apply to Kikenborg's claim because Russell's death occurred prior to the August 24, 1990 effective date of the statute.

A. Under This Court's Precedents, Causes of Action are Property Rights, and Litigants May Not be Deprived of Those Rights Without Due Process.

This Court has made it plain that a cause of action is a property right that may not be taken away without due process of law. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan*, 455 U.S. at 428, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Martinez v. California*, 444 U.S. 277, 281-82 (1980). This Court in *Logan* found that rights under the Due Process Clause could be implicated by state enactments that affected causes of action, noting that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan*, 455 U.S. at 429. Indeed, this Court has stated that once the state legislature chooses to create a cause of action, it cannot then be taken away without due process:

> While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.

Vitek v. Jones, 445 U.S. 480, 490 n.6 (1980), *quoting Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (opinion concurring in part). Under this Court's precedents, the New York courts

therefore could not deprive Kikenborg of her causes of action without due process.

This Court has also clearly stated that a legislature's enactment or alteration of statutes of limitations may themselves affect a party's due-process rights. Under the Due Process clause, "all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts." *Wilson v. Iseminger,* 185 U.S. 55, 62 (1902). This Court has repeatedly held that it is impermissible for a newly enacted or shortened limitations period to extinguish existing claims immediately upon the statute's enactment. *See, e.g., Block v. North Dakota ex rel. Board of University and School Lands,* 461 U.S. 273, 286 n. 23 (1983); *Texaco, Inc. v. Short,* 454 U.S. 516, 527 n. 21 (1982); *Wilson v. Iseminger,* 185 U.S. 55, 62-63 (1902); *Sohn v. Waterson,* 84 U.S. (17 Wall.) 596, 599 (1873). In this case, the New York legislature and the New York courts did something different but with the same result – even though the newly-enacted lengthened limitations period by its clear terms was in effect at the time Kikenborg filed her claim, the New York courts refused to apply it thereby extinguishing her cause of action and depriving Kikenborg of her property without due process of law.

B. The New York Courts' Reasoning That a Repealed Limitations Period Can be Applied to a Subsequently-Filed Action Even Though no Such Language Was Included in the Amended Statute Deprives Litigants of Their Due Process Rights.

The Petition for Writ of Certiorari should be granted to address whether a legislature's failure to include limiting

language in the statute itself or otherwise clearly notify potential litigants that the new limitations period was not actually in effect after its purported "effective date" deprives litigants of adequate notice and due process in conflict with this Court's precedents governing limitations periods. Here, the statute, published in the official state legislative reporter, is unambiguous. It clearly states that a wrongful death action must be filed within two years "of the happening of the death." New York Public Authorities Law Section 2981. The statute also states that the amendment lengthening the limitations period to two years is to be effective August 24, 1990. *Id.* If the New York courts had simply applied the clear language of the provision, including its stated effective date, it is undisputed that Kikenborg's cause of action would have been timely filed, and there would be no question of whether her due-process rights was affected.

But the New York courts refused to apply the clear language of the statute and instead decided to apply the already-repealed shorter limitations provision, under which Kikenborg's cause of action was not timely filed. In matters of statutory construction, this Court generally begins by focusing on the plain language of the statute itself. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Here, the New York courts ignored the plain language of the statutory provision itself and relied instead on an untitled paragraph buried within an extensive chapter of the 1990 Sessions Laws. This provision, purportedly limiting application of the new two-year limitations period to "actions accruing on or after" the effective date, is only available on page 66 of the 67- page full McKinney's citation to the 1990 Act. *See* McKinneys, 1990 New York Sessions Laws, Chapter 804, §

126. By burying additional restrictive language in a single, untitled paragraph in the sessions law, the New York legislature did not provide adequate notice to a reasonable individual that, despite the clear language of the new statute, it actually was not in effect on its "effective date."

By ignoring the clear statutory language and applying a different limitations period, the New York courts gave a stamp of approval to the legislature's creation of a trap that could ensnare even the most careful litigants and their attorneys. If the New York Legislature intended for the two-year limitations period to apply only to actions arising from post-amendment deaths, such language could have been included in section 2981, or at a minimum, in the historical and statutory notes.[4] But if the New York Legislature intended to restrict section 2981 beyond its plain language and instead require that all claims must be filed within 1-year, 90-days if arising from pre-amendment deaths, then the Legislature could have included such language in section 2981, but it did not do so. While purporting to extend the applicable limitations period, the New York legislature, according to the New York courts'

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[4]For example, in the medical malpractice statute of limitations, the Legislature carefully discussed the applicable trigger for determining limitations. *See* NY CPLR § 214(a) ("An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts.")

interpretation, actually immediately shortened the applicable limitations period for claimants when the date of death occurred before the effective date without clear notice that it had done so.

The New York courts' decisions stand for the proposition that even where the statute says that it is effective on a certain date, in reality that provision does not mean what it says, and a litigant like Kikenborg who relies on the plain meaning of the statute may lose a cause of action. This Court has previously concluded that a limitations period may not be enacted to extinguish an existing cause of action without proper statutory notice. The result here is clearly inconsistent with this Court's jurisprudence prohibiting state legislatures from extinguishing claims immediately upon the enactment of a new limitations provision. *See, e.g., Block v. North Dakota ex rel. Board of University and School Lands,* 461 U.S. 273, 286 n. 23 (1983); *Texaco, Inc. v. Short,* 454 U.S. 516, 527 n. 21 (1982) *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). The Writ should be granted to consider whether the mechanism used in this case to achieve the same arbitrary deprivation of property rights also violates the Due Process Clause.

C. The Writ Should be Granted Because the New York Courts' Decisions Improperly Deprive Litigants of Property Rights on the Basis of Unconstitutionally Vague Language That Does not Constitute Sufficient Notice Under the Due Process Clause.

The Writ should also be granted to consider what constitutes sufficient notice of a change in a limitations period for due process purposes. Here, the language contained in section 126 of Chapter 804 of the 1990 Sessions Laws, on which the New York courts relied in concluding that the plain language of the extended limitations period did not actually apply, is unconstitutionally vague and therefore does not constitute sufficient notice under the Due Process Clause. This Court has recognized that a non-criminal statute is unconstitutionally vague under the due process clause of the Fourteenth Amendment when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice. *See Arnett v. Kennedy*, 416 U.S. 134, 158-64 (1974); *Keyishian v. Board of Regents*, 385 U.S. 589, 597-604 (1967); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 48-49 (1966); *Jordan v. DeGeorge*, 341 U.S. 223, 230-32 (1951); *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 196-97 (1936).

A vague statute is objectionable in three main situations – when it traps the innocent by not providing fair warning, when it impermissibly delegates basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application, and when it involves sensitive areas of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S.

104, 108 (1972). A non-criminal statute is not unconstitutionally vague, however, where its terms are such that the ordinary person exercising common sense can sufficiently understand and fulfill its prescriptions. *Broadrick v. Oklahoma*, 413 U.S. 601, 607-08 (1973); *Civil Service Commission v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 575-80 (1973).

A finding of vagueness may thus result where "the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all . . .." *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). A statute may also be considered unconstitutionally vague when the statute is written in such terms that "men of common intelligence must necessarily guess at its meaning and differ as to its application . . .." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also Broadrick*, 413 U.S. at 607-08; *Rowan v. United States Post Office Department*, 397 U.S. 728, 740 (1970). A vague law is generally considered more problematic when, as here, "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin*, 439 U.S. 379, 391 (1979) (citations omitted) (discussing effect of statute on constitutional due process rights protecting abortion). In this situation, section 126 of the Session Laws is impermissibly vague and did not give Kikenborg and other litigants sufficient notice of the fact that the new limitations period was not in effect after its "effective date."

Section 126 states in pertinent part that the 1990 amendment applies to "actions accruing on or after such date." Vagueness arises from the combination of the terms action and accrual. Usually, an action commences and a cause of action accrues. Here, the Legislature, instead, referred to accrual of

the action. This language is unconstitutionally vague and deprives litigants of adequate notice regarding whether or not the enlarged two-year limitations period applies to causes of actions accruing after August 24, 1990, or whether it, instead, applies to all actions commenced after August 24, 1990.

Under both the plain language of "actions accruing" and New York law in general, it is understood that an action refers to the filing of the suit. The legislature is obviously able to distinguish between actions and causes of actions. In fact, every other provision of the New York Civil Practice Law and Rules addressing limitations period is couched in terms of "action" referring to commencement of an action. *See e.g.*, NY CPLR § 201 ("An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement."); *see also* NY CPLR §§ 211-214(a). The void-for-vagueness doctrine prohibits the enforcement of a law that contains "terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts v. United States Jaycees,* 468 U.S. 609, 629 (1984) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). State statutory provisions must articulate terms "with a reasonable degree of clarity" to reduce the risk of arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law. *Id.* The New York courts' conclusion that "accrual of action" means accrual of the cause of action conflicts with New York law, as well as the reasonable expectations of litigants such as Kikenborg, thereby depriving them of due process.

Moreover, the Legislature's use of the word "action" to mean "suit" throughout the New York Civil Practice Law and

Rules comports with the plain meaning of the word "action" versus the term "cause of action." "Actions accruing" is defined as the filing of the suit, not the accrual of claims or causes of action. Black's Law Dictionary, 21, 28 (7th Ed.1999). Thus, it is completely reasonable for litigants to believe that any action filed after the amendment's effective date is timely if filed within two years of the death.[5]

The provision also raises additional uncertainties given that other New York courts have concluded that because there is no right to commence a cause of action for wrongful death until an administrator for the estate has been appointed, "the action cannot be said to have accrued before then." *Dawson v. Langer*, 106 A.D.2d 152, 154, 484 N.Y.S.2d 743, 745 (4th Dep't 1985). It is also reasonable for litigants to conclude, based upon the change of law provisions, that a claim filed after August 24, 1990, was timely if filed within two years of the happening of death because such a result would be consistent with other limitations periods for wrongful death actions.[6]

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[5]This expectation is even more reasonable because the case upon which the New York courts relied in applying the shorter limitations period was not published until well after the shorter limitations period had run for a number of litigants, including Kikenborg. *See Torres v. New York City Health and Hospitals Corp.*, 186 A.D.2d 60, 588 N.Y.S.2d 769 (1st Dep't 1992).

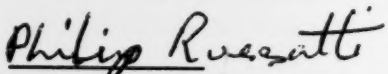
[6] The certification that appears at the front of the McKinney's reporter certifies that "it is a correct transcript of the of the text of such law as last amended as of the date as last amended as of the date of execution of this certificate and, in accordance with such section, is entitled to be read into evidence." This implies that the text is complete.

The 1990 amendment was passed in order to create consistency in limitations periods for wrongful death actions. A two-year limitations period is applicable to wrongful death actions filed on behalf of a decedent's estate against a city, county, town, village, fire district, or school district. *See* N.Y. EPTL § 5-4.1; N.Y. Gen. Mun. § 50-i. This Court has stated that "the root of the vagueness doctrine is a rough idea of fairness." *Arnett v. Kennedy,* 416 U.S. 134, 159 (1974) (*quoting Colten v. Kentucky,* 407 U.S. 104 (1972)). The New York Courts' interpretation of section 126 does not in any way comport with notions of fairness. The Writ should be granted to consider whether a litigant may be deprived of a cause of action, even though the plain language of the applicable limitations provision mandates a different result, based on another provision that, in contrast, is vague on its face.

CONCLUSION

The issues presented in this Petition are important questions of law involving this Court's Due Process Clause jurisprudence, and the Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,



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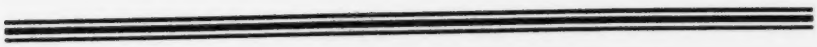

State of New York
Court of Appeals

At a session of the Court, held at the Court of Appeals Hall in the City of Albany on the 1st day of July 2002.

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

1-10 Mo. No. 506
Susanne B. Russell Kikenborg, & c.,
Appellant,

v.

New York City Health and Hospitals Corporation, et, al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars cost and necessary reproduction disbursements.

Marjorie S. McCoy
Deputy Clerk

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, NewYork 12207-1095

DECISION July 1, 2002

1-10 Mo. No. 506
Susanne B. Russell
Kikenborg, c.,
Appellant,

v.

New York City Health
and Hospitals Corporation,
et al.,
Respondents.

Motion for Leave to appeal denied with one hundred dollars cost and necessary reproduction disbursements.

Sullivan, J.P., Rosenberger Rubin, Friedman, Marlow, JJ.

250 Susanne B. Russell Kikenborg, etc.,
Plaintiff-Appellant,

Philip Russotti

-against-

New York City Health and Hospitals
Corporation, et al.,
Defendants-Respondents.

Linda H. Young

Order, Supreme Court, New York County (Stanley Klar, J.), entered October 12, 2000, which (1) denied plaintiffs' motion to deem abandoned defendants' underlying motion to dismiss the complaint as time-barred and granted defendants' cross motion for leave to settle an order based on the court's November 16, 1999 decision holding that plaintiff's motion to dismiss the complaint as time-barred should be granted, and 2) granted defendants' motion to dismiss the complaint as time-barred , unanimously affirmed, without costs.

The motion court, in granting defendants' motion to

dismiss the complaint, properly determined that plaintiffs' claims for wrongful death by reason of medical malpractice were barred by the 1 year and 90 day Statute of Limitations applicable to wrongful death by reason of medical malpractice were barred by the 1 year and 90 day Statute of Limitations applicable to wrongful death actions against Health and Hospitals Corporation defendants at the time of accrual of plaintiffs' claims (see, Unconsolidated Laws, former § 7401; Brenna v. City of New York, 59 NY2d 791, 793). Although the statutory period applicable to wrongful death actions against a public authority or public benefit corporation was subsequently lengthened to two years (see, Public Authorities Law § 2981), the longer statutory period was not in effect at the time plaintiffs' action accrued and thus did not inure to plaintiffs' benefit (see, Mattter of Torres v. New York City Health & Hosp. Corp., 186 AD2d 60).

The motion court properly exercised its discretion in

denying the plaintiffs' motion to have defendants' motion to dismiss the complaint as time-barred deemed abandoned by reason of defendants' failure timely to settle an order upon the decision ruling in their favor on their Statute of Limitations defense. Defendants' delay was relatively brief, and since the action was clearly time-barred, permitting in to proceed further would have been an exercise in futility (see, Russo v. City of New York, 206 AD2d 355, 356, lv denied 84 NY2d 813).

Plaintiff's remaining claims regarding the constitutionality of Public Authorities Law § 2981 are unpreserved for appellate review. In any event, were we to review those claims, we would find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 14, 2002.

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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KIKENBORG,

-against-

NYCH&HC,

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Sklar, J.:

By decision dated November 16, 1999 I granted defendants' motion for an order dismissing plaintiffs' action on the ground that is was time-barred.

The decision was never filed (See: 22 NYCRR 202.48) because that is not the practice in New York County. Instead a decision is logged into the motion support office's computer, the date of such entry into the computer is noted, and the motion jacket is forwarded to the order clerk to await the submission of the order. Typically the order clerk's office holds the motion for about three months and then if no order is submitted marks the motion abandoned and sends the jacket to the County Clerk's office for filing. Evidently, as a

routine matter the order clerk will accept and review orders submitted more than sixty days after the decision if the jacket has not yet been sent down to the County Clerk as abandoned. It is not entirely clear whether the order clerk marks the sixty days from the date of the decision or from the date of its entry into the computer. In the instant case the decision was logged into the court's computer on November 23, 1999.

Since a decision is not filed in New York while awaiting the settlement of an order, presumably, unless the issuing judge sends a copy of the decision to the parties, as is my practice[1], the first notice of the decision is when it is logged into the computer. For purposes of this motion I shall consider the logging dating as the date of filing under 22 NYCRR 202.38.

Concededly defense counsel did not settle an order

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[1] Concededly defense counsel received a copy of the decision on November 19, 1999.

within sixty days as required by 22 NYCRR 202.48. However on February 18, 2000 defense counsel submitted proposed orders which were returned by the order clerk with a note dated February 22, 2000 reciting "please resubmit a double-spaced order with notice of settlement and proof of service."

Before defense counsel resubmitted a corrected order plaintiff made the instant motion dated March 7, 2000 seeking a order deeming defendants' underlying motion abandoned. Corrected proposed orders were served and sent to the order clerk on about March 13, 2000. The order was reviewed by the order clerk and sent up to chambers for signature.

Defendants then by cross motion dated April 3, 2000 opposed the motion to have the summary judgment motion marked abandoned and sought an order granting them permission to settle the order on the November 16, 1999

decision and settling the order or alternatively if the court were to grant plaintiff's motion, dismissing the action on the ground that is was time-barred.

The motion is denied, and the cross motion is granted to the extent that the order sent to me from the order clerk shall be entertained and singed simultaneously herewith. While not condoning defense counsel's unexplained lateness in submitting the order, the delay was relatively short being less than a month, and the order was submitted before plaintiff made the motion, thus exhibiting a lack of intent to abandon the motion. Garcia v. NYCTA, 193 AD2d 414 (1st Dept. 1993) I find that the de minimus delay in submitting the proposed order did not constitute a waiver of the Statute of Limitations defense, nor did it amount to laches. Thus the action is clearly time-barred and there is no purpose to allowing the action to proceed only to be dismissed at trial. See: Russo v. City of New York, 206 AD2d 355 (2d Dept,

1994), lv to app den. 84 NY2d 813

The foregoing constitutes the order and decision of the court.

Dated: October 4, 2000

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J.S.C.

At a Part 29 of the Honorable Stanley Sklar of the New York Supreme Court, New York County, held at the Courthouse located at 60 Centre Street, New York, New York on the 4th day of October, 2000.

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SUSANNE B. KIKKENBORG, as Administratix of the Estate of NATHAN RUSSELL, and SUSANNE B. KIKKENBORG, Individually,

Plaintiff,

ORDER
Index No.: 16615/92

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and ELMHURST HOSPITAL CENTER,

Defendants.

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Defendants having moved by Notice of Motion and supporting affirmation of Tonya M. Lindsey, Esq., dated June 22, 1999, to dismiss on the ground that the action is time barred by the statute of limitations.

AND plaintiff having submitted an affirmation in opposition by Philip Russoti, Esq., dated July 30, 1999,

AND defendants having submitted a reply affirmation of Tonya M. Lindsey, Esq., dated August 12, 1999,

AND the parties having appeared for oral argument on the motion on November 4, 1999,

AND a memorandum decision having issued on November 16, 1999, granting the motion and dismissing the complaint (decision annexed) it is hereby

ORDERED that the motion is granted and the complaint is dismissed in its entirety against the defendants and it is further ordered that the clerk is directed to enter judgment accordingly.

ENTER

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J.S.C.